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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1989

ERNEST SIMON, et al.,

Petitioners,

v.

ESTATE OF W. P. ALLEN, DECEASED, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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OPINION BELOW

The opinion of the Court of Civil Appeals, reported at 497 S.W.2d 800, is set forth in Appendix A.

JURISDICTION

The judgment of the court below was entered on January 9, 1974. Timely petition for rehearing was filed, and denied on February 6, 1974. Mr. Justice Powell extended the time for filing petition for writ of certiorari to and including July 6, 1974. The jurisdiction of this

Court is invoked under Title 28, Sections 1257(3) and 1651(a) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, as well as Sections 2.102 and 9.102 of the Uniform Commercial Code set forth in Appendix B.

QUESTIONS PRESENTED

1. Does due process of law under the Fourteenth Amendment permit the granting of judgment by a state court, based on a jury finding that a transaction is a sale, that a party to what is clearly understood by the parties to be a security transaction is liable as a matter of law as warranting the existence of the subject matter of collateral paper?

2. Is a presumption of liability for breach of warranty based on a jury finding of the existence of a sale valid, and in accord with due process?

3. Is the granting of damages based on mutual mistake, without proof of unjust enrichment, being contrary to our legal experience, a violation of due process?

4. Can a citizen be labelled judicially as having been guilty of fraud and conspiracy without proof being adduced, and without the basis being stated for the judgment?

5. Does the attaching by a State of a warranty of the existence of the subject matter of security documents involved in the wind-up of a financing transaction under the Uniform Commercial Code constitute an unreasonable burden on interstate commerce, in contravention of the Fourteenth Amendment?

STATEMENT OF THE CASE

This case arises from an action by the respondent estate, in which the respondent bank intervened, involving claims of breach of warranty, fraud and conspiracy, and mutual mistake, involving the following transaction. Respondents, a cotton dealer and a bank involved in the financing of cotton, arranged with one Behring, a cotton dealer and warehouseman, to take over the petitioners' financing of Behring's cotton business. This financing had, prior thereto, been handled by petitioners, based on the deposit of interstate warehouse receipts as collateral security. As a consequence of the new financing arrangements entered into by the respondents with Behring, in which the petitioners did not participate or have prior knowledge, respondents delivered to petitioners drafts in the amount of the outstanding balance of Behring's indebtedness to petitioners, who as a matter of course thereupon turned the warehouse receipts representing the collateral security over to the respondents.

Thereafter Behring defaulted on the loan of the respondents, and it was discovered for the first time that the cotton represented by the warehouse receipts was not in Behring's warehouse.

Respondents claimed against the petitioners, asserting (1) that since the petitioners treated the transactions with Behring for accounting purposes as sales, although according to everyone's understanding they were in fact financing transactions, petitioners were legally liable to respondents under the warranty provisions attending sales under the Uniform Commercial Code, (2) that having received information which should have put petitioners on notice of irregularities in Behring's dealings, petitioners were responsible for any loss resulting from the mutual mistake of the parties as to the existence of the cotton,

and (3) that petitioners were chargeable with fraud and conspiracy, although they were not aware of the non-existence of any cotton covered by the warehouse receipts, although there was no reliance on the part of the respondents, who independently developed their financing of Behring, in competition with the petitioners.

The case was submitted to a jury under special issues of fact, and the jury found that the transaction was a sale, that the petitioners had no knowledge of the missing cotton, and had not failed to disclose the facts that led to the conclusion that cotton was missing, but were guilty of bad faith. Based on these findings the trial court entered judgments against the petitioners in the amounts of $475,078.03 and $203,550.08, without making any findings or indicating the basis of said judgments. Petitioners submitted motions for judgment and for mistrial, which were denied, and petitioners appealed to the Court of Civil Appeals, which affirmed the judgment of the trial court. The federal questions involved were raised in petitioners' application for writ of error to the Supreme Court of Texas, which refused the application. Petitioners seek a writ of certiorari in light of the serious federal Constitutional issues involved.

REASONS FOR GRANTING THE WRIT

Petitioners invoke the jurisdiction of this Court on the grounds, all raised in the court below, relating to the violation of their basic rights to due process of law in the sense of fair trial in such a way as to deprive them of substantial justice under the Fourteenth Amendment to the Constitution of the United States, thereby calling for intervention by this Court. Beyond this, a precedent has been established by the courts below which, if not corrected, could have far-reaching effects on financing transactions involving warehouse receipts destined for inter-

state commerce, and in the effectiveness of the Uniform Commercial Code in facilitating such commerce.

This is a situation where, under the principles established by our legal system, no liability for damages for mutual mistake could possibly exist, since such liability has never been recognized, the only remedy available for mutual mistake being rescission, and without a showing of unjust enrichment there being no ground for the return of any consideration. Further, there was no proffer of evidence of fraud or conspiracy, and on the contrary, proof adduced by respondents of mutual mistake, negating fraud. Finally, no warranty was proved, reliance being had on the warranties incorporated in the Uniform Commercial Code with respect to sales, but under the Code this transaction, being considered by all the parties as a financing transaction, is to be treated in accordance with the intention of the parties, irrespective of any formality of treatment on the ledger of one of the parties.

Petitioners were accorded a trial, given an opportunity to present evidence in their defense, to submit proposed instructions, and to argue to the jury. It is what happened thereafter that gave rise to the errors raised by petitioners, errors which go to the root of due process, and are of such importance as to call for review by this Court. Based on the jury findings, the trial court found in favor of the respondents and entered judgments against petitioners totalling $678,628.31.

In presuming legal liability for breach of warranty under the Code from the jury's finding of the existence of a sale, the courts below have exceeded the permissible reach of a proper presumption. The jury was asked to make a finding as to whether the transaction involved a sale, under the Texas procedure whereby fact findings are confided to the jury on the basis of special issues to

be determined by them. The trial court without the benefit of any further fact findings on the warranty issue found for the respondents.

Legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. A statute creating a presumption which is arbitrary is void. In the application of a statute in such a way as to declare the proof of one fact as evidence of the ultimate fact of liability, there must be a rational connection between the proven fact and the conclusion to be drawn therefrom.

For example, a statute treating the breach of a labor contract as *prima facie* evidence of an intent to defraud an employer was held to be an unconstitutional presumption. *Bailey v. Alabama,* 219 U.S. 219, 233. Similarly, the Court held that since an inference of criminal guilt may not be drawn from the inability on the part of a bank to pay demand deposits and other debts as they matured, a statute making proof of insolvency *prima facie* evidence of fraud on the part of a bank director was arbitrary and unconstitutional. *Manley v. Georgia,* 279 U.S. 1, 7. The Court also voided a Georgia statute which declared a railroad liable in damages for the operation of trains unless it could show that its agents exercised ordinary diligence. *Western & Atlantic R. Co. v. Henderson,* 279 U.S. 639.

Basically, the transaction involved in this case was a transfer of warehouse receipts held by petitioners as collateral security for a loan to respondents as a consequence of the tender by respondents to petitioners of payment in satisfaction of the outstanding indebtedness. It is this transaction which the jury found to be a sale.

If the Uniform Commercial Code required that from a fact finding that such a transaction is a sale, it be further found that the transferor warrants the continued existence of the subject matter of the documents given as collateral security, irrespective of any showing of the circumstances, including knowledge or reliance, the statute would be unconstitutional, since it would run counter to both logic and experience, as reflected in our legal system. No court in this country has so construed the Uniform Commercial Code, and there is no indication that the framers ever considered this possibility.

There are two other important considerations. The first is the size of the judgments against the petitioners, who were never found to have received any money beyond that owed to them by Behring or to have been in any manner unjustly enriched. The amount is so staggering as to cause the cessation of business as cotton merchants by the respondents, and bankruptcy, their only alternative, is not available to them since the benefit of the bankruptcy statutes is specifically excluded with respect to judgments for fraud.

The Court has held that "fair play" and "substantial justice" are the touchstones of due process. *International Shoe Company v. State of Washington,* 326 U.S. 310, 316, 317. Due process is not satisfied by compliance with technical form. *Carter v. People of State of Illinois,* 529 U.S. 173, *Foster v. People of State of Illinois,* 332 U.S. 134. The Court must, then, decide whether what occurred in this case is sufficiently serious to rise to the level of lack of fair play and denial of substantial justice.

Petitioners have been tagged with the stigma of fraud, one of the causes of action on which the trial judge found against them in fact and law, without specifying any particular cause of action, so that fraud and conspir-

acy are an integral part of the judgment. Particularly in cases involving fraud, justice requires that the basis for the judgment be stated, and the failure to do so, as in this case, is a denial of fundamental fairness in the sense of due process. Cf. *American Railway and Express Company v. Kentucky*, 273 U.S. 269, 273, *United Transport Union v. State Bar of Michigan*, 401 U.S. 576, 583. In fact, respondents abandoned the fraud and conspiracy counts in their arguments to the jury, although they have not hesitated to rely on the fraud count in their briefs to the courts below. In such a state of the record, a reputable business man would hesitate to deal with the petitioners, who have been forced to go out of business as cotton merchants.

Where the action of a State attaches a "badge of infamy" to a citizen, due process comes into play. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, *Wieman v. Updegraff*, 344 U.S. 183, 191. It is not necessary that the stigma and hardship of a criminal conviction be involved to invoke this principle. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123. Due process of law was intended to secure the individual from arbitrary exercise of the powers of government unrestrained by established principles of private rights and justice. *Twining v. New Jersey*, 211 U.S. 100, 101.

Petitioners stand labelled with conspiracy and fraud, when all they did was to accept payment of indebtedness due them, and deliver collateral security documents as they were legally required to do. Would any community consider this ministerial act the basis for a charge of breach of warranty as to the existence of the goods covered by the documents, let alone fraud and conspiracy, destroying the very livelihood of the petitioners. To affix such responsibility to such a limited function would, in the terms employed by Justice Holmes, be

more than the community could bear. *The Common Law,* Oliver Wendell Holmes, Jr. (1881), page 50.

Certainly it was never the intention of the framers of the Uniform Commercial Code to impose such responsibility. Although section 2.106 defines a sale as the passing of title for a price, both sections 2.102 and 9.102 exclude from the provisions of Chapter 2 any transaction intended as a security transaction, as the uncontroverted evidence showed to be true in this case.

The purpose of the Code was to provide uniformity in the law relating to commercial transactions throughout the country, as well as minimize uncertainties in dealings across state lines. The result of the judgments of the courts below must be to cast a pall over security transactions involving collateral unless the lending party has possession of the collateral. Henceforth, if the judgments of the courts below are allowed to stand, a party receiving payment and returning security documents may be held responsible as warranting the merchandise represented by those documents. Such a result must have an effect on interstate commerce, and call for review by the Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT BELOW

Ernest SIMON et al., Appellants,

v.

ESTATE of W. P. ALLEN, Deceased, et al., Appellees.

No. 5225.

Court of Civil Appeals of Texas, Waco.

July 12, 1973.

Rehearing Denied Aug. 9, 1973.

* * *

HALL, Justice.

This action was brought by Elizabeth F. Allen, Individually and as Independent Executrix of the Estate of W. P. Allen, Deceased, against Ernest Simon, Ernst Cohn & Co., and Melvin A. Behring and Arthur H. Behring, dba Behring & Behring, to recover damages allegedly suffered by her husband as the result of an asserted purchase by him on September 14, 1966, of several thousand warehouse receipts from Cohn & Co. which represented bales of cotton stored in the warehouse of Behring & Behring. First City National Bank of Houston, Texas, (hereinafter "First City" or "Bank") intervened, alleging that it advanced the money to Allen with which he made the purchase from Cohn & Co., that Allen pledged the receipts "and the cotton purportedly covered thereby" to the Bank as security for the loan; and among other things, that it sustained damages as the re-

sult of a "mutual mistake" on the part of Simon, Cohn & Co. and the Bank, regarding an alleged lack of cotton behind some of the warehouse receipts.

The record shows without dispute that Behring & Behring was a partnership, but that all of its activities were conducted solely by Melvin A. Behring. Therefore, our reference to Behring will mean Melvin Behring and the partnership.

Under the name of Allen and Company, Allen operated as a successful cotton broker in Houston for over thirty years. Behring was located in Dallas. He bought and sold cotton. Additionally, he was the owner of several cotton warehouses. Simon, a Houston resident, through Cohn & Co., also functioned as a cotton merchant. Allen, Simon individually, and Cohn & Co., all banked with First City. Behring banked at Dallas.

Allen began financing Behring in 1960. The source of Allen's funds was First City. Simon, through Cohn & Co., also financed Behring during 1966. Simon's source of money was also First City. Henry Oliver, a senior vice-president of First City, handled the transactions with Allen and Simon on behalf of the Bank.

Unlike Allen's financing arrangements with Behring, the dealings between Behring and Simon were not straight-forward financing transactions, but were structured by them to appear as purchases and sales of cotton. When Behring paid a loan, Cohn & Co. returned receipts to Behring by means of a sales invoice to Toyo Cotton

Company a large cotton firm operating in Dallas. This arrangement gave the outward impression that Cohn & Co. was a successful cotton merchant doing a large volume of sales. The cotton involved was stored in Behring's warehouses. This permitted him to remove the cotton from storage without redeeming or canceling the warehouse receipts held by Allen, Cohn & Co., and the Bank. Under written agreements with Behring, Simon expressly reserved the right to sell the cotton evidenced by the warehouse receipts held by Cohn & Co. at any time.

Around the 1st of September, 1966, Cohn & Co. began invoicing the cotton directly back to Behring, rather than through Toyo, but still using sales invoices. By this time Behring was experiencing serious financial difficulties, and Simon had become increasingly concerned and anxious regarding Behring's payments of his obligations to Cohn & Co. Finally, drafts drawn by Cohn & Co. on Behring on September 7th for $250,142.61, and on September 8th for $276,096.88, both with sales invoices and warehouse receipts attached, which had been deposited to the account of Cohn & Co. at First City and upon which immediate credit had been granted by the Bank, were dishonored by Behring.

Between September 9th and September 13th, checks totaling about $550,000 were given by Behring to Allen. Allen deposited the checks with First City and was given immediate credit. The checks were returned because of insufficient funds.

On September 13, 1966, Behring went to Houston and met with Allen and Oliver to discuss payment of the bad checks he had given to Allen. The meeting culminated in an agreement by Allen to borrow enough money from the Bank to purchase the cotton represented by the warehouse receipts which were attached to the Cohn & Co./Behring Drafts of September 7th and 8th, and to purchase another group of warehouse receipts covering an additional 3,775, bales of cotton (with an invoice value of $343,052.74) which was the balance of the Behring cotton held by Cohn & Co. The Bank's loans to Allen that day, when added to his prior indebtedness, created a total indebtedness by him to First City of $1,585,066.42.

On the evening of September 13th, Oliver told Simon by telephone of the arrangement that had been made for Allen to buy all the Behring cotton from Cohn & Co. The next day, Allen delivered two checks aggregating $870,336.80 to Simon in payment of the warehouse receipts that were attached to the unpaid drafts of September 7th and 8th, and in payment of the additional sales invoice held by Cohn & Co. on Behring cotton.

The two checks from Allen were deposited to the Cohn & Co. account at First City. Cohn & Co. paid the Bank $526,707.89 to clear the drafts of September 7th and 8th, which had been charged back to the account of Cohn & Co. when not paid by Behring, together with minor charges for handling the drafts and their dishonor. Within one week following September

14th, Simon withdrew $267,850 from the account of Cohn & Co. and deposited it to his personal account.

On November 4, 1966, Allen discovered that much of the cotton represented by the warehouse receipts he received from Cohn & Co. was missing. Soon thereafter Behring filed an application in bankruptcy. In early December, Allen died.

Trial was to a jury. Answering special issues numbered as follows, it made findings, among others, that:

(1, 2, 3, and 4). On September 14, 1966, Cohn & Co. transferred the questioned warehouse receipts to Allen and sold the cotton represented by the receipts to Allen.

(5, and 7). 7,459 bales of cotton represented by the warehouse receipts were missing from the warehouse at the time of the transfer and sale from Cohn & Co. to Allen.

(6 and 8). Allen paid Cohn & Co. $678,628.31 for the missing bales.

(31). First City granted, and Cohn & Co. withdrew, the immediate credits created by the deposit of the drafts dated September 7th and September 8th, 1966, totaling $526,377.61, as a result of a mutual mistake of fact.

Judgment was rendered on the verdict in favor of plaintiff and First City against Simon, Cohn & Co., and Melvin A. Behring, jointly and severally, for $475,078.03;

and for plaintiff against Simon, Cohn & Co., and Melvin A. Behring, jointly and severally, for the additional sum of $203,550.28; and for plaintiff against Melvin A. Behring for the further sum of $412,248.26. Plaintiff's suit against Arthur H. Behring was dismissed with prejudice, apparently upon plaintiff's motion.

Only Simon and Cohn & Co. have appealed. In 28 points of error they challenge certain actions of the trial court, and some of the findings, and the judgment, for sundry reasons. We affirm the judgment.

Pertinent, here, V.T.C.A., Bus. & C., provides as follows:

> Sec. 7.507. Where a person . . . transfers a document of title for value [otherwise than as a mere intermediary acting with authority and in good faith], then unless otherwise agreed he warrants to his immediate purchaser . . . (3) that his . . . transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

> Sec 2.313. (a) Express warranties by the seller are created as follows: . . . (1) Any affirmation of fact . . . made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation . . . (2) Any description of the goods which is made part of the basis of the bargain

creates an express warranty that the goods shall conform to the description . . .

Sec. 2.314. [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .

Sec. 2.711. Where the seller fails to make delivery . . . then with respect to any goods involved . . . the buyer may . . . [recover] so much of the price as has been paid.

Appellants argue without benefit of jury finding that Cohn & Co. was only an "intermediary" in its dealings with Allen; and that there was no "sale" of cotton by the Company to Allen as found by the jury.

[1] Appellants have no points of error in which they assert that the jury's answers to special issues 1 through 8 are not supported by the evidence, or that those answers should be disregarded for any reason. The only complaints presented by points of error that relate to those issues deal with the failure of the trial court to define "sale" and "transfer" as requested by appellants in their objections to the charge. No definitions of the words were submitted by appellants to the trial court. Thus, any error in the court's failure to define the terms was waived. Rule 279, Tex.Rules Civ.Proc. The findings reflected by the answers to the first eight issues stand unchallenged by appellants.

[2] Cohn & Co. made express warranties of quantity by stating on its three invoices in question the number of bales of cotton sold thereby, totaling 9,612 bales. When Cohn & Co. sold nonexistent cotton to Allen, as found by the jury, it breached both express and implied warranties set forth in the Texas Business and Commerce Code, supra; and thereby rendered itself liable to Allen for at least the amount he paid therefor. This is sufficient to support the judgment awarded plaintiff against Cohn & Co.

[3] Appellants contend that the evidence is legally and factually insufficient to support the finding that the granting of immediate credits by First City on the drafts of September 7th and 8th, and Simon's withdrawal thereof, resulted from a mutual mistake of fact. We disagree. Oliver testified that if he had possessed any knowledge or suspicion "of the shortage of cotton behind these warehouse receipts," then he would not have allowed Cohn & Co. credit on the drafts. Simon testified that when he entered into the transactions on September 7th, 8th and 14th, he believed there was cotton behind the receipts; and that if he had known otherwise he "would not have entered into any transaction with the bank." There is other evidence supporting the finding, and in the light of the entire record it is not against the great weight and preponderance of the evidence.

[4] One who has entered into a contract as the result of a mutual mistake of a

material fact may avoid the contract and recover the damages he has suffered thereby. 38 Tex.Jur.2d 741, Mistake, Sec. 4. Judgment for the Bank on the ground of mutual mistake was proper.

[5] Simon says that judgment should not have been rendered against him, individually. The record shows without dispute that at the time in question Simon owned 99.6% of the stock of Cohn & Co.; that he was its president and exercised complete and independent control of the company, and that it was merely a conduit for the transaction of what was actually his own private business. These circumstances support the conclusion of the trial court that he should be held personally liable for the corporate transactions. Moore v. Savage (Tex.Civ.App., 1962) 359 S.W. 2d 95, 97, writ refused, n.r.e. (Tex.Sup., 1962), 362 S.W.2d 298; 14 Tex.Jur.2d 134, Corporations, Sec. 13.

We have carefully considered, and overrule, appellants' remaining points of error. In some, the matters complained of have not been preserved for appellate review; the others do not present reversible error.

The judgment is affirmed.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

§ 2.102. Scope; Certain Security and Other Transactions Excluded From This Chapter

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. (59th Legis., Ch. 721, Sec. 2—102.)
Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

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§ 9.102. Policy and Scope of Chapter

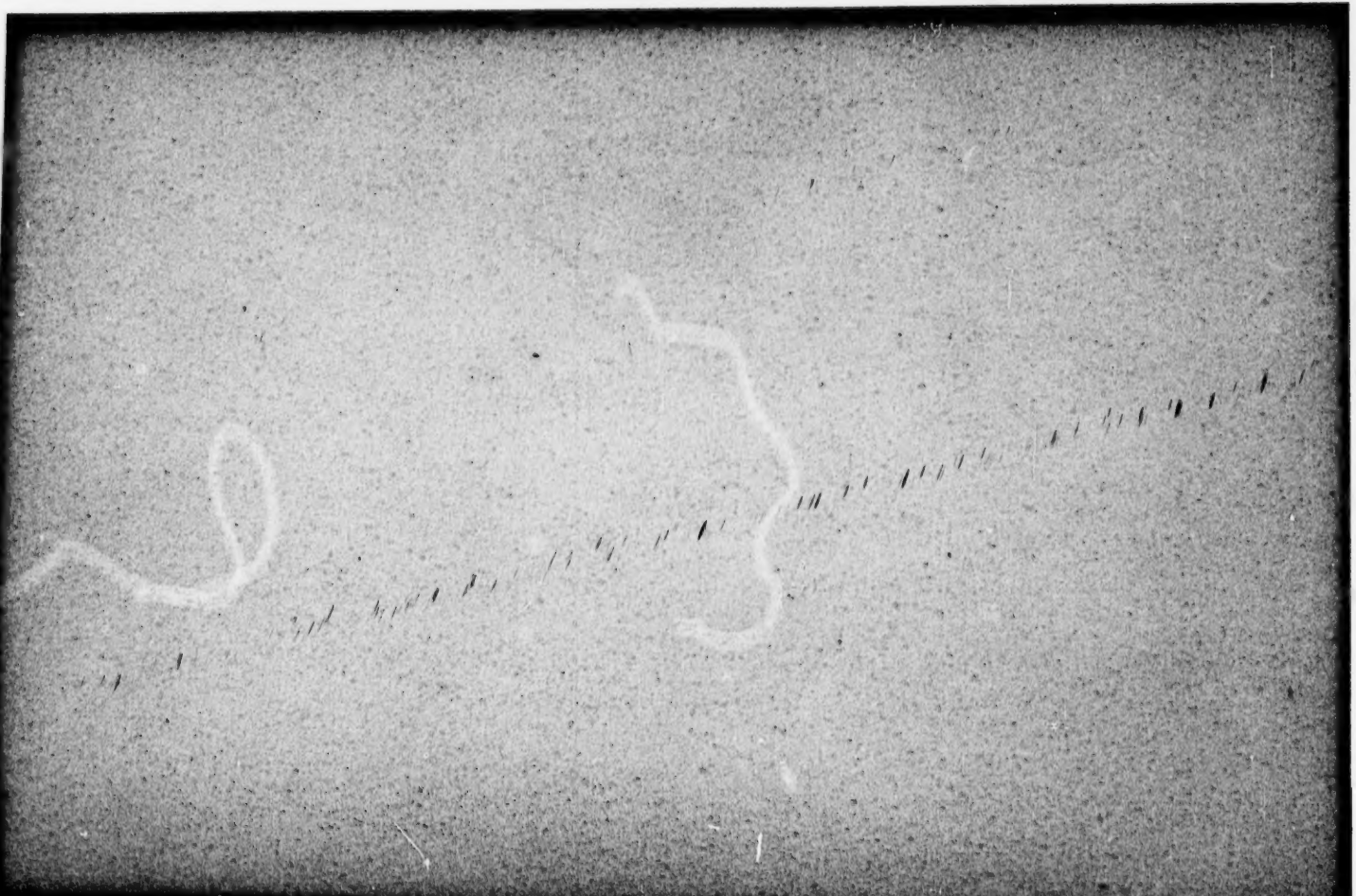
(a) Except as otherwise provided in Section 9.103 on multiple state transactions and in Section 9.104 on excluded transactions, this chapter applies so far as concerns any personal property and fixtures within the jurisdiction of this state.

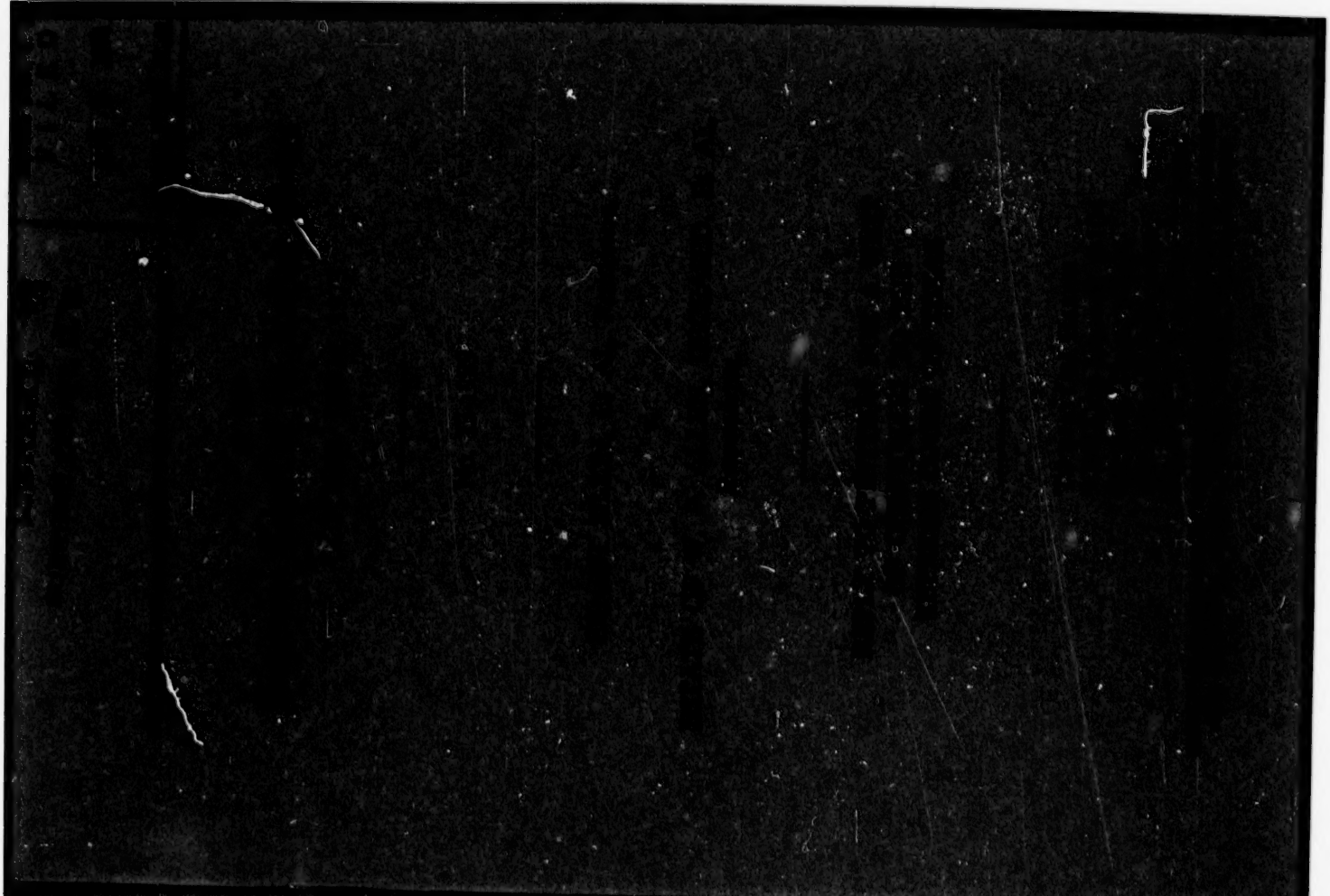
(1) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights; and also

(2) to any sale of accounts, contract rights or chattel paper.

(b) This chapter applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This chapter does not apply to statutory liens except as provided in Section 9.310.

(c) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply. (59th Legis., Ch. 721, Sec. 9—102.)
Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1989

ERNEST SIMON, Et Al., *Petitioners,*

v.

ESTATE OF W. P. ALLEN, DECEASED, Et Al., *Respondents.*

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable Supreme Court of the United States:

Now comes the estate of W. P. Allen, Deceased, and files this Reply to the Petition for Writ of Certiorari on file.

QUESTIONS PRESENTED

1. Whether Petitioners' contentions have been preserved for review by this Court.

2. Whether a substantial federal question of due process is presented with respect to the following:

   a. A jury finding that a given transaction was a sale, and judgment accordingly;

b. A judgment that in a sales transaction, the seller is liable in damages for cotton that was paid for but missing from storage;

c. A judgment of liability based on jury findings of bad faith and failure to disclose material facts.

3. Whether an undue burden on interstate commerce is created by a judgment that in a sales transaction, the seller is liable in damages for cotton that was paid for but missing from storage.

This brief will not consider questions pertaining to principles of mutual mistake because such questions pertain to the judgment in favor of the other Respondent. As to Question One, the Petition should be denied because Petitioners have not presented their contentions in a timely manner. As to Questions Two and Three, the Petition should be denied because Petitioners have not presented a substantial federal question. See *Zucht v. King*, 260 U.S. 174 (1922).

STATEMENT OF THE CASE

The Opinion of the Texas Court of Civil Appeals correctly stated the nature and result of this case in its Opinion published at 497 S.W.2d 800. Since Petitioners argumentative statement of the case contains extraneous conclusions as to the pleadings and evidence, we present our own statement of the case.

This case centers around a transaction of September 14, 1966. In the transaction, a close corporation by the name of Ernst Cohn and Company transferred warehouse receipts representing approximately 9000 bales of cotton to W. P. Allen, a sole proprietorship doing business as Allen and Co., for a consideration of $870,-

336.80. On November 3, 1966, Allen discovered that substantially all of the cotton represented by such receipts was missing from storage. Subsequent discoveries indicated that Ernest Simon, the president and 99% shareholder of Ernst Cohn and Company, had grounds for suspicion that the cotton was missing from storage at the time of the transfer of September 14, 1966. Mr. Allen killed himself in December of 1966, and suit was brought by his widow against various Defendants to recover for the bogus cotton. Mrs. Allen was joined in the suit by First City National Bank of Houston, who had financed Allen in the transaction. Mr. Simon and the close corporation are Petitioners herein, seeking review of the adverse judgments of the Texas courts.

Petitioners have distorted the record by asserting that the transaction of September 14, 1966 was in some sense a financing transaction. Petitioners had the power of sale of the cotton involved, and the jury found from the evidence that Petitioners sold the cotton to Allen. See Special Issues 14; 475 S.W.2d at 803. Although Respondents failed to prove Simon's actual knowledge that cotton was missing before September 14, 1966, Respondents secured favorable jury findings on Simon's bad faith, Simon's failure to disclose material facts known to him at the time, and Simon's alter-ego relationship with Ernst Cohn and Company. Where applicable, some of the pertinent portions of the record will be dealt with under specific points in the argument in this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners have failed to preserve their contentions for review by this court.

2. Petitioners have failed to raise substantial federal questions of due process. From the evidence, the jury found that Petitioners sold cotton to Allen, and that a large amount of that cotton was missing from storage at the time of the sale. A judgment against Petitioners on such findings is logical and not arbitrary.

3. Any injury to Petitioner's reputation has been caused, not by unconstitutional state action, but by Petitioners' own acts and deeds.

4. Petitioners have failed to show any affect on interstate commerce by the judgment and decisions below.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO PRESERVE THEIR CONTENTIONS FOR REVIEW BY THIS COURT.

Petitioners did not raise their due process and interstate commerce arguments until motion for rehearing after the Texas Supreme Court had refused to review the judgment and decision of the lower courts. Under Texas law such a belated attempt constitutes a waiver of any erroneous ruling pertaining to such points. See Tex. Rules of Civ. Proc. 469 and 374 (Appendix A); 3 Tex. Juris. Sec., "Appeal and Error", Sec. 192 and authorities there cited. Similarly, this court has often ruled that it is too late to raise a federal question for the first time in a petition for rehearing after decision of an appellate court. *E.g., Herndon v. State of Georgia,* 295 U.S. 411 (1935); *Waters Pierce Oil Company v. State of Texas,*

212 U.S. 112 (1909); *McCorquodale v. State of Texas*, 211 U.S. 432 (1908).

II.

PETITIONERS HAVE FAILED TO RAISE SUBSTANTIAL FEDERAL QUESTIONS OF DUE PROCESS.

A. The Evidence Supports Jury Findings of a Sales Transaction.

On the evidence in the case, the jury found that the transaction between the parties was a sale of cotton from Petitioners to Mr. Allen. 475 S.W.2d 802-803. Petitioners have sought to challenge that fact in two appellate courts of the state of Texas and now seek to have this court review the finding on due process grounds. In order to present the question before this Court, Petitioners have distorted the record by asserting that the transaction was a financing arrangement, giving no record references to such an assertion because there are none.

The evidence to the jury was that the transaction was structured as a sale of cotton. The banker involved testified the transaction was a sale. (Oliver, S.F. 48-54; 108-112). Petitioners prepared and delivered sales invoices on the cotton involved. (Pl. Ex. 5, 6 and 7). After the transaction, Petitioners prepared and delivered a sales confirmation pertaining to the transaction. (Oliver, S.F. 277-287) In Petitioners' accounting records, Petitioners wrote "sold to Allen & Co." to describe the transaction. (Simon S.F. 472-479; Pl. Ex. 72). In addition to the documentary evidence, Mr. Simon stated in deposition

testimony that he assumed Mr. Allen would have "merchandise". (Simon S.F. 478).

The Court should not be mislead by Petitioners arguments about lack of fair play. The Respondents secured jury findings based on ample evidence in support of their theories of recovery; in reality, Petitioners' claim is not that they were treated unfairly but merely that the trial judge and jury and two Texas appellate courts have held against the unsupported arguments.

B. There is no Violation of Due Process by a Judgment that, in a Sales Transaction, the Seller is Liable in Damages for Cotton that was Paid for but Missing from Storage.

The lower court interpreted statutes under the Uniform Commercial Code to require Petitioners to return money they received for non-existent cotton. The statutes involved are set forth in the lower court opinion; briefly, the court held that Petitioners had breached express warranties of quantity, implied warranties of merchantability, and the statutory warranty that the transfer was "rightful and *fully effective* with respect to the title to the document and the goods it represents." Petitioners challenge this holding as arbitrary.

It is logical and rational to require that a seller stand behind his merchandise and account for it; and if, as here, the merchandise cannot be delivered at a minimum the seller should be required to pay back monies paid for non-existent goods. See T.B.C.C. § 2.711(a). Otherwise, the seller gets the buyer's money for absolutely nothing. See *Livingston v. Anderson*, 58 S.E. 505, 508 (Ga. Civ. App. 1907). Such a holding is not only logical, it is supported by abundant precedent in cases not involving doc-

uments of title. 51 Tex. Juris. See "Sales" § 333 and cases there cited. Similarly, with respect to transactions covered by documents of title, pre-code authority supports the analysis that a transfer of a warehouse receipt warrants the existence of the goods. WILLISTON, CONTRACTS, Section 1063; WILLISTON, SALES, Section 422, Section 432; *Continental Trust Company v. Bank of Harrison*, 134 S.E. 775 (Georgia 1926); *Livingston v. Anderson*, 58 S.E. 505 (Ga. Civ. App. 1907); *Standard Seed Company v. Balfour Guthrey & Company*, 208 NYS 2d 966, 999 (N.Y. Sup. 1960).

C. The Judgments of the Lower Courts Have Not Violated Petitioners' Rights Pertaining to Reputation.

Petitioners assert that the judgment and decision below violate Petitioners' constitutional rights by blemishing their reputation without due process. The cases cited by Petitioners discuss arbitrary and capricious state action, such as the lack of a hearing, that is not present in the instant case.

Petitioners were sued under various theories that entitled the Respondents to judgment. The jury considered evidence on bad faith and fraudulent concealment and alter-ego and found against the Petitioners. Based on the various jury findings, all of which were supported by evidence, the Trial Court entered its judgment. Throughout the proceedings, Petitioners had able counsel in the Trial Court and on appeal. Liability could have been found against Petitioners on numerous theories more injurious to Petitioners than those in the printed opinion. If Petitioners' reputations have been injured, it is because of Petitioner Simon's acts and culpable deeds and not

because of the actions of the jury, the lawyers, and the judges involved in this case.

III.

NO UNDUE BURDEN ON INTERSTATE COMMERCE IS CREATED BY A JUDGMENT THAT IN A SALES TRANSACTION, THE SELLER IS LIABLE IN DAMAGES FOR COTTON THAT WAS PAID FOR BUT MISSING FROM STORAGE.

Without authority, Petitioners assert that the lower court judgment and decision "must have an affect on interstate commerce, and call for review by the Court." The unsupported premise of this unsupported argument lies in Petitioners' unsupported assertions that the transaction involved was a security transaction and not a sale. As previously discussed, the finders of fact found conclusively that the transaction was a sale. Any analysis of the affect on interstate commerce should begin with the facts as found by the jury, and the logical judgment based on those facts, and not with mere unsupported arguments by Petitioners.

It is difficult to imagine any reason the judgment below would create an undue burden on interstate commerce. There is no indication that the State of Texas is striving to discriminate against trade coming into the state; there is nothing to indicate any attempt to contain products within the state; in short, there is no indication of any attempt to treat those engaged in interstate commerce in any disadvantageous way. Under the principles set forth in the instant case, a Texas citizen selling cotton to a citizen of another state would nonetheless be liable for

damages if cotton were missing from storage. Since Petitioners have not indicated with specificity how interstate commerce is affected, this brief will not attempt to catalogue and dismiss all the possible affects on interstate commerce. It is sufficient to point out the general requirement that "not only must the burden strike the Court as undue or heavy, but it must be certain to affect those engaged in interstate commerce in a substantially disadvantageous way." 2 ANTIEAU, MODERN CONSTITUTIONAL LAW, p. 65-66, citing *Collins v. American Buslines,* 350 U.S. 528, 531 (1956). The instant case falls outside of that general requirement.

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent,
Estate of W. P. Allen, deceased.

CERTIFICATE OF SERVICE

Service was posted on all attorneys of record this _____ day of _____, 1974.

THOMAS OSA HARRIS

APPENDIX A

Tex. R. C. P. 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under the circumstances where no motion for new trial is required by these rules, if relied upon an appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary. Amended by order of March 31, 1941, effective Sept. 1, 1941.

Tex. R. C. P. 469. Requisites of Application

The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should

not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a conflict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the state-

ment there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited.

(f) If any brief or application for writ of error is unnecessarily lengthly or not prepared in conformity with these rules, the court may require same to be redrawn. Amended by Order of March 31, 1941, effective September 1, 1941; by order of September 20, 1941, effective December 31, 1941; and by order of April 12, 1962, effective September 1, 1962.

SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1989

ERNEST SIMON, ET AL., *Petitioners*

v.

ESTATE OF W. P. ALLEN, DECEASED, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

MEMORANDUM FOR FIRST CITY NATIONAL BANK IN OPPOSITION

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MEMORANDUM FOR FIRST CITY NATIONAL BANK IN OPPOSITION

INTRODUCTION

Respondent has foregone any statement here of "Questions Presented." Indeed, we do not believe any of the "questions presented" in the Petition are genuinely raised by the record in this case. Any attempt to restate the questions in terms we consider justified by the factual record would necessarily produce questions quite different from those Petitioners intended to bring here.

STATEMENT OF FACTS

A statement of the facts in this case must be made by the Respondent, First City National Bank, because it does not agree with Petitioner's statement.

A. HISTORY OF THE PARTIES AND THE RELATIONSHIPS

Allen was a successful cotton spot broker who had operated Allen & Company, a sole proprietorship, for over thirty (30) years as the means for conducting his business (S.F. 15-16).

Since 1939, Allen had done business with Respondent, First City National Bank,[1] through Henry Oliver,[2] who at the time involved in this lawsuit was a Senior Vice President of First City with general supervision of all cotton loans handled by that institution (S.F. 17, 9).

Behring & Behring was a firm operated primarily by Melvin A. Behring[3] (S.F. 143). It operated as a cotton merchant, one who buys and sells cotton (S.F. 17). Moreover, Behring & Behring was the owner of a number of cotton warehouses (S.F. 18).

Allen, since 1960, had been engaged in inventory financing for Behring & Behring, backed by money loaned by First City (S.F. 20). Allen pledged the warehouse receipts from Behring as collateral to secure loans obtained in order to finance Behring & Behring. As the cotton represented by the warehouse receipts was sold, First City, under authority of a bill of lading addressed to a third

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1. Hereafter referred to as First City.
2. Hereafter referred to as Oliver.
3. Hereafter referred to as Behring.

party, would release the appropriate warehouse receipt, held by the Bank as collateral (S.F. 30, 40).

Cohn & Company acted, like Behring & Behring, as a cotton merchant (S.F. 21). Its principal stockholder and spokesman was Ernest Simon. First City also financed Simon's cotton operation. This relationship was specifically based upon the individual guaranty of Ernest Simon for the obligations of Cohn & Company in the amount of TWO MILLION DOLLARS ($2,000,000.00), to First City (S.F. 93-96). Cohn & Company also engaged in financing Behring & Behring (S.F. 346).

Simon and Behring disguised their financing scheme as a sale from Behring to Simon, back to Behring, or to a third party, Toyo Cotton Co. Thus what appeared to be sales from a cotton merchant to an exporter or other cotton merchant was in actuality a financing arrangement for the benefit of Behring. Such facts, had they been known would, of course, have affected the decision of First City concerning how much to lend Cohn & Company, inasmuch as such a financing transaction tended to increase the liability of Cohn & Company over and above the amount they owed as evidenced by their notes. Oliver did not know at that time that it was a financing arrangement (S.F. 29-40, 263-266).

B. THE DEMISE OF BEHRING & BEHRING

Behring & Behring encountered serious financial difficulties.

1. Behring & Behring's Relationship with Simon During this Period

Following an extended summer vacation in 1966, Simon returned to Cohn & Company and resumed financ-

ing operations (S.F. 828). These operations had been temporarily suspended during Simon's vacation because Cohn & Company was essentially a one-man operation, owned and controlled by Simon. The circumstances surrounding the new series of financing for Behring & Behring strongly indicated to Simon that something was wrong.

There was a marked increase in the turnover of warehouse receipts plus an increase in the amounts of money involved, as well as an increase in the frequency of the transactions (S.F. 829, 850). In August 1966, Simon requested a financial statement from Behring & Behring. The financial statements sent in response to his request were non-certified and over a year old—covering only that period up to May 1965, and had not been audited by an independent third party (S.F. 830). Even these inadequate financial statements revealed a company operating with very little equity and inflated values of certain listed assets (S.F. 830).

Petitioner's accountant, after learning of these revelations, suggested that multiple financing might be occurring, i.e., the same warehouse receipts might be returned by Behring to Cohn & Company more than once for financing (S.F. 831). This was made possible by the fact that Simon would often "sell" warehouse receipts back to Behring rather than third parties. An investigation by Simon and his accountant, for the receipt numbers revealed that it was not unusual for the same bale of cotton to come back for financing more than once and sometimes as much as three times (S.F. 832).

As early as August 1966, Simon's accountant suggested going to the warehouse to see if the cotton was actually in storage. Simon chose instead to call Behring, who prom-

ised to slow down the volume of transactions (S.F. 833, 872).

Finally, a draft drawn by Cohn & Company on Behring & Behring for $250,142.61, which was deposited to Cohn & Company's account at First City on September 7th, was dishonored (S.F. 45). On September 8, 1966, Simon deposited in Cohn & Company's account at First City a second draft on Behring & Behring for $276,096.88. This draft was likewise dishonored, making a total of over $526,000.00 in drafts that had been dishonored by Behring & Behring in a period of two days (S.F. 45, 124).

On Sunday, September 11, 1966, Simon flew to Dallas in an attempt to get the debt that was evidenced by the drafts reduced to notes and obtain additional collateral (S.F. 451). This was done in spite of the fact that warehouse receipts stood behind the drafts as collateral for their "financing" (S.F. 457). Two days later Cohn & Company sold to Allen these same warehouse receipts about which Simon, justifiably felt so insecure.

2. Behring & Behring's Relationship with Allen

a. Prior to the Meeting of September 13, 1966

Allen & Company had no series of warnings as did Simon and Cohn & Company. The first mention of their relationship came on September 9, 1966, five days before the sale between Simon and Allen. On that day Allen requested First City to extend credit through Allen & Company for the approximate amount of $1,000,000.00 to cover the financing of 10,000 bales of cotton which Behring represented had been sold (S.F. 48-49).

Between September 9 and September 13, 1966, four or five checks of Behring & Bethring totaling some $550,000.00 which Allen & Company had deposited in its account at First City were returned because of insufficient funds. Since Allen & Company had received immediate credit for these checks, they were charged back against the Allen & Company account. Upon notification Allen requested an immediate meeting with Behring concerning it (S.F. 49).

b. The Meeting of September 13, 1966

On the afternoon of September 13, a meeting was held in Oliver's office. Present at the meeting were Allen, Oliver, Behring, and Mr. Stockbridge, Allen's office manager (S.F. 49).

Behring brought $17,000.00- $18,000.00 worth of stock in State General Insurance Company of Dallas, two memberships in The Dallas Cotton Exchange and two or three cases of single bale receipts, which he represented would be sufficient collateral to secure the $550,000.00 (S.F. 51).

Following further conversation between Behring and Allen, Allen & Company agreed to purchase the warehouse receipts which were attached to Cohn & Company's drafts on Behring & Behring which had been dishonored. Allen further agreed to purchase another group of warehouse receipts covering an additional 3,775 bales of cotton with an invoice value of $343,052.74, which was the balance of the cotton Cohn & Company held from Behring & Behring (S.F. 53-54). As a result of these decisions, Allen borrowed $1,245,324.54 from First City.

C. THE SALE AND SUBSEQUENT EVENTS

On September 14, 1966, the same day that First City credited Allen & Company's account in the amount of $1,245,324.54, two large checks were written on that account made made payable to Cohn & Company (S.F. 106). The checks were in the amount of $526,377.61, for the warehouse receipt attached to the unpaid drafts, and $343,959.19, for the balance of the Behring & Behring cotton held by Cohn & Company (S.F. 106).

1. The Actions of Simon Following the Sale

On the same day Allen & Company's checks were written, deposits were made in the Cohn & Company account for $526,377.61, and the following day another deposit was made in the amount of $343,959.19 (S.F. 120-121). Immediately thereafter there was a withdrawal of $576,707.89, the amount of the returned drafts.

Since the bank gave immediate credit to Cohn & Company upon the deposit of the Behring & Behring drafts in question, the bank charged Cohn & Company's account for the amounts of said drafts when they were returned unpaid (S.F. 125). This charge against the Cohn & Company account created an overdraft in said account since Cohn & Company had withdrawn the credit created by the deposit of the drafts. The overdraft was paid by the deposit of the funds from Allen & Company (S.F. 130).

On September 15, 1966, two additional withdrawals were made from Cohn & Company's account. The first was for $58,300.00 the amount of the promissory note that Cohn & Company owed to First City (S.F. 132). Other large withdrawals were made between September 15, 1966 through September 21, 1966, totaling $272,-

000.00. During this same period, September 15, 1966 through September 21, 1966, a series of deposits totaling $267,850.00 were made into the individual accounts of Ernest and Vera Simon (S.F. 132-134, 137).

Two or three weeks after the sales transaction, block receipts—representing 2,400 bales of cotton that were "blocked" for delivery—were found that had been issued in the name of Cohn & Company (S.F. 57). These blocked bales were now a part of Allen & Company's collateral. Consequently, it was felt necessary that the blocked receipts be endorsed by Cohn & Company so that they could be sent to the warehouse and be reissued in the name of Allen & Company (S.F. 58).

Simon, when presented with the receipts, called Oliver to ask why he had to endorse them. Upon explanation, he asked if by signing the receipts he was guaranteeing the existence of the cotton (S.F. 59). Even though his attitude was that he did not wish to endorse the receipts, he finally did so and they were returned to First City.

2. The Actions of Allen Following the Sale

On November 4, 1966, Allen called Oliver to report that he had just received a phone call from Behring. Behring wanted Allen to come to Dallas to see him. In Dallas, Allen discovered that the majority of the receipts were worthless (S.F. 61-62, 64).

3. Related Events

In December of 1966, Allen killed himself. Subsequently Behring & Behring was placed in bankruptcy.

Mrs. Allen, independent executrix of the Estate of W. P. Allen, and First City filed suit against Cohn &

Company and Simon, individually, seeking to recover their loss. Prior to the trial hereof Cohn & Company ceased to transact business, and Simon commenced to reside in Switzerland. Simon did not personally appear at the trial.

D. TRIAL RESULTS

After a lengthy trial before a jury, a verdict was returned. The jury verdict was supported by substantial evidence, therefore, the trial court entered a judgment that the Estate of Allen and First City recover from Cohn & Company, Simon and Behring, jointly and severally, the sum of $475,078.03, plus interest; that the Estate of Allen recover from Cohn & Company, Simon and Behring, jointly and severally, the further sum of $203,-550.28, plus interest; that the Estate of Allen recover from Behring the further sum of $412,248.26, plus interest; that the Estate of Allen recover from Simon $1.00 as exemplary damages; and that the Estate of Allen and First City recover from Cohn & Company, Simon and Behring, jointly and severally, all costs of court.

The Texas Court of Civil Appeals affirmed the trial court. 497 S.W.2d 800 (Tex. Civ. App.—Waco, Ref. N.R.E.). The Supreme Court of Texas refused to grant a writ of error, stating there was no reversible error.

REASONS FOR DENYING THE WRIT

I. FAILURE TO RAISE ISSUE BELOW

Petitioners, Cohn & Company and Ernest Simon, seek review of a decision of the Texas Court of Civil Appeals affirming a trial court verdict rendering Petitioners

liable to this Respondent, First City National Bank, in the amount of $475,078.03.

None of the five points of error cited by Petitioners in support of their application for this Writ of Certiorari were raised as error on Motion for New Trial; in the Texas Court of Civil Appeals; on Motion for Rehearing to the Texas Court of Civil Appeals; or on Application for Writ of Error to the Supreme Court of Texas. Consequently, the constitutional arguments have been waived under provisions of the Texas Rules of Civil Procedure, T.R.C.P. Rule 469 and Rule 374 (Appendix B), p. 20-23). This court has consistently refused to grant certiorari on issues not raised in the lower courts, but raised on appeal for the first time. *Crowell v. Randell,* 35 U.S. (10 Peters) 368 (1836); *Tacon v. Arizona,* 410 U.S. 351 (1973); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

Cardinale v. Louisiana, supra, was a case in which the Petitioner sought appellate review under one of the same statutes as this Petitioner, Title 28, Section 1257(3) United States Code. In refusing to rule on Petitioner's error, Mr. Justice White said:

> " . . . It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368,

> 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court . . ." *Id.*, 438

Having failed to submit special issues at trial concerning whether this particular transaction involving the warehouse receipts was a sale, Petitioners have waived the right to challenge the fact of sale on appeal. T.R. C.P. 279, (App. B), and *Allen v. Williams,* 380 S.W.2d 718 (Tex. Civ. App.—Waco 1964, No Writ). It is basic in our system of jurisprudence that all issues complained of as error on appeal must have been raised at trial.

II. THE JUDGMENT OF THE STATE COURTS COMPLIED WITH THE REQUIREMENTS OF DUE PROCESS OF LAW

Petitioner, after availing himself of every judicial procedure allowed in the State of Texas in defense of this case, now complains that he was denied due process. Petitioner would have this court believe that "any badge of infamy" attached to a citizen consititutes a denial of due process where the stigma results from State action. In support of this concept, Petitioner cites cases not similar to the case at bar. The "badge of infamy" quoted in *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971), was applied without affording the individual a hearing. *Id.,* 436-437. It is difficult to understand how that case pertains to Petitioner's position in this particular case inasmuch as Petitioner was afforded a jury trial and numerous appellate reviews. Not one scintilla of evidence has been submitted by Petitioner to demonstrate a denial of due process.

In support of his contention of denial of due process, Petitioner cites *Twining v. New Jersey,* 211 U.S. 78, obviously confusing the intended purpose of due process of law with the elements required to provide due process. Mr. Justice Moody, delivering the majority opinion in *Twining v. New Jersey, supra,* 112, cites *Rogers v. Peck,* 199 U.S. 435, making it abundantly clear that this Petitioner has been afforded due process:

> "Due process of law, guaranteed by the Fourteenth Amendment, does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and adequate opportunity to defend himself in the prosecution."

Surely Petitioner is not alleging lack of either notice or of an opportunity to defend himself. The trial of this case was reset numerous times in an effort to get Petitioner to return from Switzerland and appear at the trial. When the trial was finally held the Petitioner refused to return to Texas for the trial, but he was represented by two able and respected attorneys of his selection.

Citing *Manley v. Georgia,* 279 U.S. 1 (1928), Petitioner contends he has been wronged in a similar manner. *Manley, supra,* did not find the Georgia statute defective because it allowed a presumption of fraud based on the existence of specific facts. Rather, the defect in the statute was its failure to limit the presumption of fraud to specific situations demonstating acts of ommission or commission of the accused which tended to show his responsibility, *Id.,* 6-7. Whereas here, the jury finding that Petitioner acted in bad faith was based on evidence establishing that Petitioner was aware at the time of the sale

of the multiple invoicing of the warehouse receipts; he was aware of the non-existence of a profit margin by Behring; he was aware Behring's financial statement was inadequate; he was aware that both a lawyer and his accountant had advised him to check on the existence of the cotton; he was aware of enough facts and filled with enough doubt that following the sale he inquired as to whether or not his signing of the receipts guaranteed the existence of the cotton.

The trial of this case lasted nearly two weeks. After hearing the evidence a jury determined the questions of fact concerning the existence of a sale between the parties and specifically found that:

(1) There was a sale; [Special Issue (1-4)]

(2) Cohn & Company and Simon failed to disclose facts material to the transaction; [Special Issue (14), (15), (16) and (17)]

(3) Cohn & Company and Simon acted in bad faith; [Special Issue 13)]

(4) The parties were at least operating under a mutual mistake of fact as to the existence of the cotton; [Special Issue (30), (31)]

(5) Simon had induced the bank to rely on his guaranty giving rise to the principle of promissory estoppel [Special Issue findings (32), (33) and (34)]

Each of these findings would be sufficient by itself to support the judgment of the courts below.

Petitioner claims that he was merely performing a simple clerical act of transferring paper and he has been wronged by the arbitrary actions of a trial court, a jury,

and two appellate courts. The great weight of evidence is to the contrary. Consequently, Petitioner's contention should be recognized as having no merit.

III. THE DECISION OF THE TRIAL COURT DOES NOT INVOLVE ANY FEDERAL QUESTION AFFECTING INTERSTATE COMMERCE

In a desperate bid to delay further the enforcement of this judgment, Petitioners seek to manufacturer a federal question worthy of review by asserting that the warranties imposed upon the seller of documents of title under the Uniform Commercial Code, Section 7.507, will have a detrimental impact on interstate commerce and on the effectiveness of the Uniform Commercial Code in facilitating such commerce. Respondents maintain the facts of this case do not present such a federal question. Moreover, it is difficult to imagine a situation having a greater detrimental effect on interstate commerce than to allow an individual to sell warehouse receipts, representing goods in interstate commerce, knowing at the time of sale that the goods represented by such receipts might not exist; not communicating these suspicions to the buyer; and then allowing the seller to escape all responsibility for his deceit.

The trial court in finding Petitioner liable to the Respondent in the amount of $475,078.03, was attempting to return each party to the position he occupied prior to the sale. The evidence of mutual mistake concerning the existence of the cotton as represented by the warehouse receipts was quoted by the Court of Civil Appeals in its opinion and found to be sufficient to support the verdict in favor of Respondent. *Estate of Allen v. Simon,*

497 S.W.2d 800, 804. Likewise, the presumption of the making of warranties from the selling of cotton by the Petitioner. A statute is not arbitrary because it provides that a seller warrants, unless he provides to the contrary, that:

(1) The transfer is *rightful and fully effective with respect to the title* to the document *and the goods* it represents. (UCC, § 7.507(3)). (App. A)

(2) . . . the goods shall be merchantible . . .(UCC, § 2.314 (a)). (App. A)

(3) the goods should conform to the description of the goods which is made a part of the basis of the bargain. (UCC, § 2.313(a)(2)). (App. A)

After the trial, Petitioners manufactured the allegation that the transaction between Cohn & Company and Allen was not a sale but merely a financing scheme. Respondents submitted their theory of the case to the jury, Petitioners did not. Consequently, Petitioner's assertions on appeal, that the transaction was other than a sale, are totally without support in the pleadings, the evidence or in any findings of the jury.

Cohn & Company entered into a sale a transaction whereby Allen gave Cohn & Company valuable consideration for non-existent cotton. Allen did so because he believed and trusted Behring and Simon and did not know nor suspect that the warehouse receipts he received were not backed by cotton in storage. On the other hand, Cohn & Company, through Simon, had knowledge of material facts which Simon failed to disclose to Allen, as was his duty. First City, therefore, contended and the jury found that Simon was guilty of bad faith and fraud.

First City further contended and the jury found that if Simon had no actual knowledge of the absence of the cotton and innocently assumed that the warehouse receipts in question represented cotton in storage, then he was mistaken as to a fact sufficient to void the transaction between Cohn & Company and Allen on September 14, 1966.

There can be no doubt that there is ample evidence to support the findings of the jury and judgment of the trial court, and that the legal theories applied by the trial court, and the Texas Court of Civil Appeals are reasonable and authorized by law in cases of this nature.

CONCLUSION

The Constitution is not violated by this case. Only by further delay can an injustice be done. Consequently, for all the reasons set forth above, the Petitioners' Application for Writ of Certiorari should be refused.

Respectfully submitted,

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APPENDIX A

STATUTES

V.T.C.A. Tex. Bus. & Com.

§ 2.313. Express Warranties by Affirmation, Promise, Description, Sample

(a) Express warranties by the seller are created as follows:

(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(b) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. (50th Legis., Ch. 721, Sec. 2-313.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§ 2.314. Implied Warranty: Merchantability; Usage of Trade.

(a) Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section

the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(b) Goods to be merchantable must be at least such as

(1) pass without objection in the trade under the contract description; and

(2) in the case of fungible goods, are of fair average quality within the description; and

(3) are fit for the ordinary purposes for which such goods are used; and

(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved, and

(5) are adequately contained, packaged, and labeled as the agreement may require; and

(6) conform to the promises or affirmations of fact made on the contained or liable if any.

(c) Unless excluded or modified (Section 2.216) other implied warranties may arise from course of dealing or usage of trade. (59th Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§ 7.507. Warranties on Negotiation or Transfer of Receipt or Bill.

Where a person negotiates or transfers a document of title for value otherwise than as a mere intermediary under the next following section, then unless otherwise agreed he warrants to his immediate purchaser only in addition to any warranty made in selling the goods

(1) that the document is genuine; and

(2) that he has no knowledge of any fact which would impair its validity or worth; and

(3) that his negotiation or transfer is rightful and fully effective with respect to the title to the document and the goods it represents.

APPENDIX B

TEXAS RULES OF CIVIL PROCEDURE

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that the objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence

and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Rule 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under the circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary. Amended by order of March 31, 1941, effective Sept. 1, 1941.

Rule 469. Requisites of Application

The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a con-

flict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

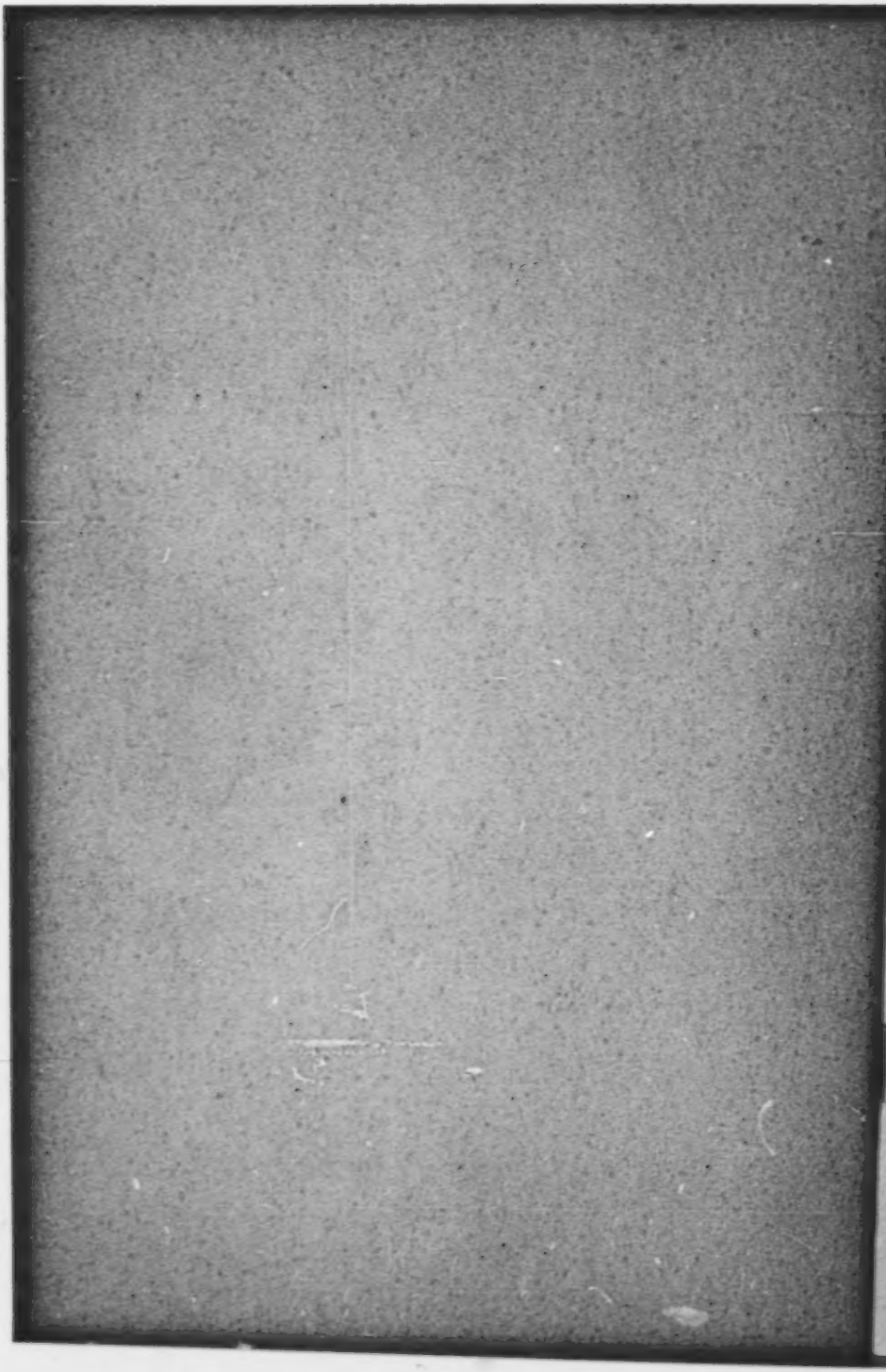
(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged,

together with reference to the pages of the application where the same are cited.

(f) If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn. Amended by Order of March 31, 1941, effective September 1, 1941; by order of September 20, 1941, effective December 31, 1941, and by order of April 12, 1962, effective September 1, 1962.



SUPREME COURT, U. S.

FILE

AUG 19 19

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1989

ERNEST SIMON, et al.,

Petitioners,

v.

ESTATE OF W. P. ALLEN, DECEASED, et al.,

Respondents.

PETITIONERS' REPLY BRIEF

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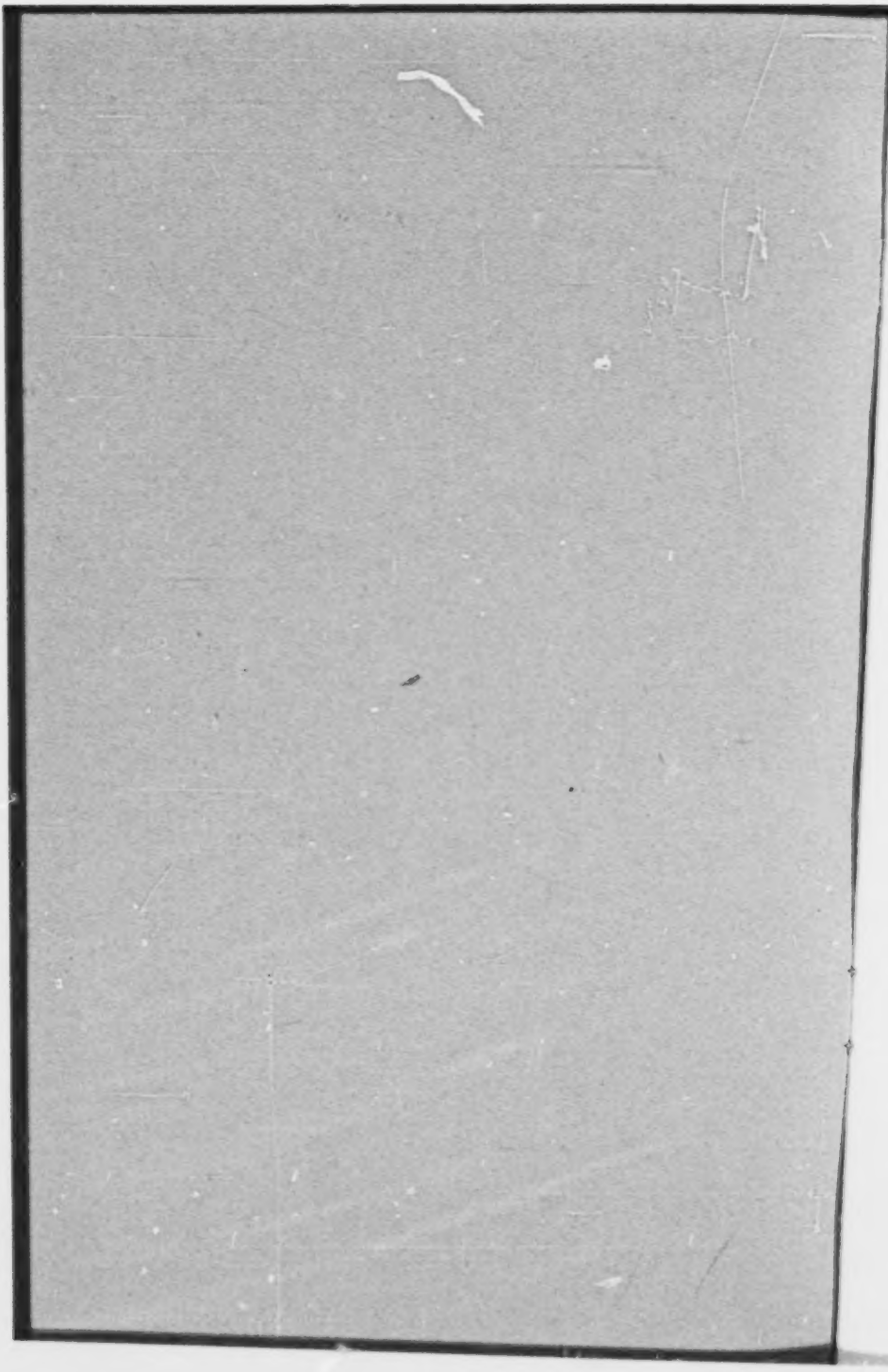

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ERNEST SIMON, et al.,

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Respondents.

PETITIONERS' REPLY BRIEF

Respondents in their briefs in opposition have raised a number of arguments not covered by petitioners in their brief, and to which petitioners desire to respond:

1. As to jurisdiction, respondents make the following arguments:

(a) *Waiver* – It is argued that petitioners waived their rights to raise the federal questions by not presenting them to the trial judge.

Actually, the deprivation of constitutionally protected rights did not occur until after the jury verdict on the

special issues. It is the action of the trial court in granting judgment based on those findings, and the appellate court in making the first findings in the case, that gave rise to the errors asserted. Particularly under the circumstances existing here, waiver is not to be lightly inferred, and nothing done by the petitioners either expressly or by implication constituted such a waiver.

(b) *Preservation* – It is argued that no federal issues were raised except in the petition for rehearing in the court below. The liberty is being taken to quote one passage from page 42 of the petitioners' brief in the court below in support of their Application for Writ of Error:

> The Trial Court found in favor of Allen and the Bank in fact and law, without specifying any particular causes of action, and causes of action for fraud, bad faith and conspiracy were included. Such a finding would constitute a stain on the character and reputation of Petitioners, and affect their substantive rights to certain legal benefits, such as the possibility of a discharge in bankruptcy, and the ability to obtain licenses and permits requiring evidence of unblemished character. Justice requires that the basis for the judgment be stated, and the failure to do so in this type of case could well constitute a denial of fundamental due process. Cf. *American Railway and Express Company v. Kentucky*, 273 U.S. 269, 273, *United Transport Union v. State Bar of Michigan*, 401 U.S. 576, 583, and *Williams v. Tooke*, 108 F.2d 758.

The quotation from the *Cardinale* case relied on by respondent bank was based on a situation where the sole federal question urged had never been raised in the state courts. The *Zucht* case, cited by the respondent estate, involved a compulsory vaccination ordinance chal-

lenged not as arbitrary but based on the broad discretion granted for purposes of public health. The Court held that this issue could not be raised by writ of error – only by petition for certiorari. Neither case appears applicable to the present case.

In the present case the trial court made no findings, and in no manner indicated that the counts of fraud and conspiracy, which were not argued to the jury or the court, were included in the judgment. It was only in respondents' briefs on appeal that there was any mention made of these counts. The first statement as to the basis of the judgment was contained in the opinion on appeal.

The *Herndon* case cited by respondent estate brings out the recognized exception to the rule as to raising of federal questions on rehearing; namely, where the questions arise for the first time in the appeal itself, and could not have been anticipated. Both the majority and dissenting opinions cite as authority the cases of *Saunders v. Shaw,* 244 U.S. 317, 320, *Missouri ex rel. Missouri Gas Company v. Gehner,* 281 U.S. 313, 320, *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677, 678, *American Security Co. v. Baldwin,* 287 U.S. 156, and *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 367.

2. The arguments of respondents place great emphasis on the finding of the jury as to the existence of a sale. It is not that finding that petitioners challenge, but its use by the trial court, *ipso facto,* as the basis for imposing liability on petitioners under the sales warranty provisions of the Uniform Commercial Code, in the face of the specific statement in that Code that the sales provisions do not apply to transactions which, although in the form of sales, are intended to operate only as security trans-

sactions (Sections 2.102 and 9.102, set out in full in Appendix B to Petition for Writ of Certiorari). Respondents in their briefs in the court below admitted, as used in the opinion on appeal, that the transaction was simply "structured" as a sale, and it is difficult to believe that they seriously contend that it was a sale in anything other than form.

The respondent estate argues that petitioners have distorted the record by asserting that the transaction was a financing transaction, and that petitioners have refused to give record references to support such an assertion because there are none. This respondent itself spoke in its brief in the court below of petitioners and Allen having "structured the transaction as a sale", the very situation covered by sections 2.102 and 9.102. Petitioners have raised issues of law only, but in light of the allegation of distortion, petitioners submit as Appendix A hereto a summarization of the testimony of witnesses and exhibits from the Statement of Facts prepared for appeal purposes. Petitioners' position is that resolution of such fact issues is not necessary to the consideration of the legal issues they have raised, and these fact issues have no place in the consideration of these legal issues.

3. Respondent bank denies the existence of any indication in the record that the Senior Vice President of the respondent bank, Henry Oliver, had any idea the transaction was anything other than a sale. While here again petitioners' position is that the attempt to introduce a fact issue is unavailing, since their issues are all legal, and based not on the jury special findings, but rather the subsequent actions of the courts below, they would point out that Mr. Oliver testified at trial as follows (SF 213):

Q. As far as you and the Bank were concerned, the request to put all of the Behring indebtedness in Mr. Allen's account came from Mr. Allen? A. Yes.

Q. And Mr. Simon not anyone else had ever requested that this be done by the Bank? A. No. Mr. Simon was not at the meeting.

It is quite apparent, as set out in the Petition, that petitioners played no part in the working out of the transaction substituting Allen for petitioners as financing creditor for Behring as the result of the meeting between Oliver, Behring, Allen and Allen's office manager on September 13, 1966 at the Bank; and the bank, through Mr. Oliver, was fully aware of the nature of the transaction, while petitioners were not even consulted. The elements of a sale for purposes of the imposition of the warranty provisions of the Uniform Commercial Code did not exist.

4. Respondent bank takes the position on the fraud issue of being totally innocent of any knowledge as to Behring's actions. However, Behring's check in favor of the bank dated September 7, 1966, a week before the meeting, had been returned: a significant consideration if reliance is claimed as the basis for claiming any payment due from petitioners on the ground of fraud. In any event, no effort was made to press the fraud count, so that the issue should be moot. As to mutual mistake, avoiding a contract is not synonymous with the granting of damages, a concept not recognized by our law. Even if rescission had occurred, which is not the case, the bank would have been required to make a showing of unjust enrichment to obtain restitution. This was never done.

Irrespective of the foregoing, petitioners' claims do not require the determination of any of the fact issues attempted to be raised by respondents.

5. The respondent estate argues that an undue burden on interstate commerce has not been shown to invoke the Court's jurisdiction. It is submitted that being exposed to liability for warranties under the Uniform Commercial Code never intended to apply to security transactions, based simply on the structured form of the transaction as a sale, when it was clearly recognized to be a delivery of security paper following a change of financing arrangement, is such an undue burden.

The *Collins* case, cited by the respondent estate in support of its argument that this case does not call for the Court's intervention, involves the jurisdiction of the Arizona Industrial Commission over interstate bus lines. The Court held that the interest of the state was paramount in providing remedies for injuries committed within it, so long as it had not taken over the remedies in cases involving interstate buses as in the case of interstate railroad carriers. This is far different from the situation in the present case.

6. Respondent bank, in support of its contention that petitioners are confused between the purpose and the elements of due process, quotes from *Rogers v. Peck,* 199 U.S. 435, a case involving the question of whether habeas corpus would be justified in a situation where the type of confinement following conviction in a state proceeding had never been challenged in the courts of the state. It is submitted that the respondent misconceives petitioners' challenge as relating to the trial, rather than the action of the court following the special findings of the jury.

Similarly, respondent bank suggests that petitioners contend that they have been wronged in the same manner as occurred in *Manley v. Georgia,* 279 U.S. 1. Petitioners

cited that decision as a leading case indicating the position of the Court with respect to improper presumptions. The Court there held that the inference required by the statute was not restricted to any particular point or specific issue, and was as uncertain and vague as the terms "fraudulent" and "fraud", contrasted with "fairly", "legally", "honestly", and "in accordance with law", when used to describe the management of a bank. Here the term "sale" was applied to encompass what was in fact a security transaction structured as a sale, which by the terms of the Uniform Commercial Code was not to be considered a sale for purposes of the application of the sales provisions of the Code. The facts of the two cases are different, but the same rationale applies. Here the taking of the jury finding of sale in a non-technical sense, and applying the sales provisions of the Code without further findings, particularly in the face of the exclusionary language of the Code, was an improper presumption.

CONCLUSION

Respondents have attempted to raise issues not necessary to the consideration of the present petition, which involves important federal questions.

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EXHIBIT A

Summary of Trial Record, With References to Statement of Facts Prepared for Appeal

In about April, 1966, petitioners began some financing of Behring's cotton. Financing Agreements were entered into whereby Behring would borrow money from petitioners and deliver cotton warehouse receipts to petitioners to secure the loan. On advice of petitioners' Certified Public Accountants, these transactions had the appearance of a purchase by petitioners and sale by Behring but were actually financing transactions. Petitioners would in turn borrow the money from the Bank and pledge Behring's warehouse receipts to secure the loan. When Behring repaid the loans these transactions had the same appearance of a sale by petitioners and purchase by Behring or some other company who was actually a nominee of Behring. (Simon, SF 345-363, 414, 523-536; Box SF 825-826, 844-847; Oliver, SF 168-191; Pl's Exs 26 through 30, 34). All parties were aware on September 13, 1966, that these were financing transactions (Simon, SF 558-563; Oliver, SF 22, 29-39, 164-168, 185-186; 203-204, 241-244).

During August and the first part of September of 1966 Behring was indebted to petitioners to the extent of approximately $870,000.00 and petitioners held warehouse receipts and block receipts representing approximately 9,612 bales of Behring's cotton as security for the loans and in September acquired additional security in the form of a Deed of Trust to a cotton gin. (Pl's Exs. 5, 6, 7, 37, 38, 39 and 40; Simon, SF 451-457; Martin, SF 677-679). The great majority of these ware-

house receipts had been issued by the San Marcos Cotton Compress which Behring owned and this fact was known by all parties. (Oliver, SF 67-68, 199, 216; Simon, SF 423-425, 445-447).

Petitioners became concerned about the nature and extent of these transactions and began insisting that Behring repay the loans and take petitioners out of their financing arrangement (Pl's Exs 33 and 34; Simon, SF 412-441, 480-485, Box 827-837, 850-867). Behring agreed to pay the petitioners' loans but was financially unable to do so (Pl's Exs 5, 6, 7, 35, 36, 37, 38, 39 and 40; Oliver, SF 41-49; Simon, SF 451-457, 620-626).

At a meeting between Henry Oliver, Sr., Vice President of the respondent bank in charge of cotton loans, Allen and Behring on September 13, 1966, Allen (who held $550,000.00 of Behring's checks) and Oliver agreed that the Bank would loan Allen approximately 1.2 million dollars which Allen would in turn loan to Behring so that Behring could pay the $550,000.00 in checks held by Allen and pay the $870,000.00 he owed petitioners. Behring was to pledge with Allen, as security for the loan, certain items including "two or three" cases of cotton warehouse receipts (which he called "free collateral") and the warehouse receipts held by petitioners. Allen in turn was to pledge to the Bank the warehouse receipts and other Behring collateral as well as certain securities of his own. (Oliver, SF 48-54, 194-195, 201-204, 209-216). Petitioner had not requested or suggested such agreements be made, did not attend this meeting nor participate in any of the agreements reached therein although he was informed on September 13 of the decisions made. (Oliver, SF 53-54, 200-201; Simon, SF 628-629).

On September 14, 1966, the loan transactions took place as agreed and Allen paid off Behring's debt to petitioners and petitioners delivered the warehouse receipts to him. (Pl's Exs 5 through 12; I's Exs 3 through 12; Oliver, SF 54-59, 101-130).

Prior to these transactions Oliver raised a question with Allen as to whether there was any cotton behind these warehouse receipts. Allen asked Behring the same question and Behring assured him that there was cotton behind these receipts. Allen told Oliver of his conversation with Behring and expressed complete confidence in Behring. (Oliver, SF 67, 199-200, 216-217, 240-241).

It subsequently developed that, prior to September 14, 1966, Behring had caused a substantial amount of his cotton to be shipped out of his warehouse without cancelling the warehouse receipts and that the majority of the cotton represented by the warehouse receipts pledged by him to Allen, and in turn by Allen to the Bank (including a majority of the warehouse receipts received from petitioners), was not in the warehouse. (Pl's Exs 80 and 81; Oliver, SF 61-64, 71-72; Martin, SF 676-696, 737-742).

None of the parties (except Behring) had actual knowledge that the cotton was not in the warehouse on September 14, 1966, (Oliver, SF 68; Simon, SF 494-495).

CERTIORARI DENIED